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IN THE

Supreme Court of the United States

October Term 1960

No. 111

BURTON N. PUGACH,

Petitioner,

—against—

HONORABLE ISIDORE DOLLINGER,
District Attorney of Bronx County, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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The nature of the Respondents' opposition, the briefs filed as *amicus curiæ* by the Attorney General of the State of New York and that of the District Attorneys' Association of the State of New York in this case, suggests that an elaboration of Petitioner's position may be of assistance to the Court.

1.

The shocking feature of this case is that even after this Court rendered its decision in *Benanti* v. *U. S.*, 355 U. S. 96, prominent public officials of the State of New York, District Attorneys, and Attorney Generals, all members of the State and the United States Supreme Court bar,

come before this Court seeking this Court's blessing to continue criminal activities in violating a Federal Statute in which the Congress of the United States has promulgated the "ethical standards" for all the people of the United States (See *Nardone* v. *U. S.*, 302 U. S. 379).

It is more shocking that they seriously importune this, the highest Court of our land, to seek its approval and condonance of their continuous and willful violation of Section 605 of the Federal Communications Act. They seek to place this Court in the anomalous position of saying that to intercept a communication and divulge its contents, etc. is a violation of Federal Laws for which they can be sent to jail and at the same time ask this Court to say that it will not interfere with their right to do so no matter how often they violate Federal Laws. To adopt this strange legalistic course would be to make a mockery of a Statute passed by the Congress of the United States and bring disrespect to our Courts of justice.

At this point it might be appropriate to quote a portion of this Court's opinion in *Cooper* v. *Aaron*, 358 U. S., pages 17 and 18:

> "However, we should answer the premises of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case. It is necessary to recall some basic constitutional propositions which are settled doctrine.
>
> Article VI of the Constitution makes the Constitution the 'supreme law of the land' in 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the

notable case of Marbury v. Madison, 1 Cranch 137, 177, that 'it is emphatically the province and duty of the judicial department to say what the law is.' * * * and Article VI of the Constitution makes it of binding effect on the States 'any thing in the Constitution or Laws of any State to the contrary not withstanding.' Every state legislator and executive and *judicial officer* is solemnly committed by oath taken pursuant to Article VI, Cl. 3, 'to support this Constitution'.

No state legislator or executive or *judicial officer* can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that 'If the legislatures of the several states may, at will, annul the judgments of the Courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery * * * ' United States v. Peters, 5 Cranch 115, 136. A Governor who asserts a power to nullify a federal court order is similarly *restrained*." (Italics ours)

Judge Waterman, in his concurring opinion in the Court below, based his concurrence in part on the following reasons (R. 46):

"* * * but I am not willing also to assume that a New York state trial judge will permit such evidence to be admitted over the objection of defense counsel. After all, New York state judges, as we, were bound when they took office, to support the Constitution of the United States; and they are fully cognizant of Article VI, Clause 2 thereof:

'2. This Constitution, and the Laws of the United States which shall be made in Pursuance

thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'

Schwartz v. *Texas*, 344 U. S. 199 (1952), and *Benanti* v. *United States*, *supra*, make clear, and all the opinions of the court in the present case recognize, that divulgence of the contents of a wiretap unless the divulgence is authorized by the sender will constitute a violation of Sections 605 and 501. It is therefore presumptuous to assume that any New York State trial judge will acquiesce to the commission of a crime against the United States in his presence in his courtroom by a witness testifying under oath."

In *Nardone* v. *U. S.*, 302 U. S. 379, at page 383, the Court stated as follows:

> "The answer to the question is one of *policy*. Congress may have thought it less important that some offenders should go unwhipped of justice than that the officers should resort to methods *inconsistent with ethical standards and destructive of personal liberty*." (Italics ours)

The underlying principle of §605 was further elaborated in the second *Nardone* case (308 U. S. at 340-341):

> "We are here dealing with specific prohibition of particular methods in obtaining evidence. The result of the holding below is to reduce the scope of §605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of §605 would largely stultify the policy

which compelled our decision in Nardone v. United States (302 U. S. 379), supra. That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well-being. This Court found that the logically relevant proof which Congress had outlawed, it outlawed because 'inconsistent with ethical standards and destructive of personal liberty.' 302 U. S. 379, 384. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' See Gouled v. United States, 255 U. S. 298, 307. A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose."

This Court in *Schwartz* v. *Texas*, 344 U. S. 199, being confronted with an isolated *accomplished* violation of Sec. 605 ruled that Congress did not intend to write a rule of evidence for the state. However, under the *guise* of a rule of evidence we are confronted with a consistent and persistent violation of Sec. 605. Should this Court refuse to reappraise *Schwartz* then this shocking situation can best be remedied by injunctive proceedings. *Schwartz*, however, ruled that the state officers violated federal law when they divulged the intercepted communication. In *Benanti*

v. *U. S.*, 355 U. S. 96, counsel for this Petitioner was also the attorney for Benanti. The Solicitor General of the United States presented a thorough and learned brief in an endeavor to uphold the validity of the New York Constitution, Article 1, Section 12, and the New York Code of Criminal Procedure, Section 813-a. This Court, however, in *Benanti* stated at pages 104-106:

> "Respondent does not urge that, constitutionally speaking, Congress is without power to forbid such wiretapping even in the face of a conflicting state law. Cf. Weiss v. United States, 308 U. S. 321, 327. Rather the argument is that Congress has not exercised this power and that Section 605, being general in its terms, should not be deemed to operate to prevent a State from authorizing wiretapping in the exercise of its legitimate *police functions*. However, we read the Federal Communications Act, and Section 605 in particular, *to the contrary*.
>
> The Federal Communications Act is a comprehensive scheme for the regulation of interstate communication. In order to safeguard those interests protected under Section 605, that portion of the statute pertinent to this case applies both to intrastate and to interstate communications. Weiss v. United States, supra. The natural result of respondent's argument is that both interstate and intrastate communication would be removed from the statute's protection because, as this Court noted in Weiss, the intercepter cannot discern between the two and will listen to both. *Congress did not intend to place the protections so plainly guaranteed in Section 605 in such a vulnerable position.* Respondent points to portions of the Act which place some limited authority in the States over the field of interstate communication. The character of these mat-

ters, dealing with aspects of the regulation of utility service to the public, are technical in nature in contrast to the broader policy considerations motivating Section 605. Moreover, the very existence of these grants of authority to the States underscores the conclusion that had *Congress intended to allow the States to make exceptions to Section 605, it would have said so.* In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out *a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy.* Cf. Pennsylvania v. Nelson, 350 U. S. 497; Hill v. Florida, 325 U. S. 538; Hines v. Davidowitz, 312 U. S. 52." (Italics ours)

The authorities above cited are impressive. It is, therefore, clear that in *Benanti* this Court has held these constitutional and legislative provisions to be an invasion of a field preempted by the Congress.

When, nearly a generation ago, this Court sustained a federal conviction resting on wiretapped evidence obtained in violation of state law, Mr. Justice Holmes characterized the proceeding as "dirty business." *Olmstead* v. *United States*, 277 U. S. 438, 469, 470. The rule of that case, that wiretapping does not violate the Fourth Amendment's prohibition against searches and seizures, still stands, despite several subsequent opportunities to strike it down. See *Goldman* v. *United States*, 316 U. S. 129, 136; *On Lee* v. *United States*, 343 U. S. 747, 758, 762. Nor is there any present reason again to reach the constitutional issue: the case at bar can be disposed of under the statute.

Mr. Justice Holmes was "not prepared to say that the penumbra of the 4th and 5th Amendments covers the defendant." 277 U. S. at 469. His comment about "such dirty business" was evoked by the circumstance that what the federal officers did in *Olmstead* involved the commission of a crime under state law, and so he concluded (277 U. S. at 471) that "if we are to confine ourselves to precedent and logic, the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a *crime of the officers of the law.*"

If we start from Mr. Justice Holmes' premise that a violation of state law by federal officers is "dirty business", then is it not far more reprehensible for state officials, members of this bar, district attorneys, and judges of the State Court, to aid and abet in the violation of federal laws and to violate their oaths to support the Constitution and the Laws of the United States?

2.

As heretofore indicated this Court should reexamine *Schwartz.* However, if this Court decides not to disturb the doctrine therein contained then this Court should exercise its equitable powers of injunction. *Stefanelli* v. *Minard,* 342 U. S. 117 is not to the contrary.

Involved in *Stefanelli* was an illegal search and seizure by state police and this Court's refusal to suppress, in a state prosecution, the evidence illegally seized by the state police, in violation of the Fourth Amendment.

Evidence obtained as the fruit of an unreasonable search and seizure is (subject to a qualification fully discussed below) inadmissible in a federal prosecution because of the Fourth Amendment's protection against unreasonable searches and seizures. *Weeks* v. *United States*, 232 U. S. 383. That Amendment by its own force limits all federal action. But the first eight Amendments which were adopted to curb the powers of the newly created Federal Government, and whose adoption was indeed the price exacted for ratification of the Constitution, do not bind the States: that proposition was first established in *Barron* v. *Baltimore*, 7 Pet. 243, in an opinion written by Chief Justice Marshall, who had himself been a participant in the ratifying process as a member of the Virginia Convention. See 1 Beveridge, *The Life of John Marshall*, 364-480.

Repeated attempts to make the provisions of those amendments bind the States, on the theory that the first eight amendments were included in their entirety within the Fourteenth Amendment, have been consistently rejected by this Court. *Hurtado* v. *California*, 110 U. S. 516; *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319. The last rejection, where the issue was extensively explored, took place only twelve years ago. *Adamson* v. *California*, 332 U. S. 46.

It is true that in *Wolf* v. *Colorado*, 338 U. S. 25, 27-28, the Court held that

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause."

But the *Wolf* case did not purport to overrule the settled line of cases, from *Barron* v. *Baltimore* through *Adamson* v. *California*, or the principle that the first eight amendments did not limit the State *ex proprio vigore*. To the contrary, the Court said (338 U. S. at 26), "The issue is closed", and it affirmed a state conviction that rested upon evidence obtained by an illegal search.

Three propositions necessarily follow from *Wolf*.

First, the state officers who participated in the illegal search that turned up the evidence on which Wolf was convicted did not violate any federal law, using "law" in its broadest sense.

Second, the Fourth Amendment does not bind the States.

Third, the Fourth Amendment is not fully incorporated in the Fourteenth.

The federal command in the case at bar is found in a statute of general application, which applies to all communications, even those that are purely intrastate. *Weiss* v. *United States*, 308 U. S. 321. The scope of that statute leaves no room for interpretation. In *Stefanelli* the Court refused to exercise its equitable powers because of the many possible flanking attacks on the many constitutional issues that might be raised in the course of a criminal trial in the state courts. The Court in *Stefanelli* stated, at page 119, referring to *Wolf*, the following:

> "The security of one's privacy against arbitrary intrusion by the police—which is the core of the Fourth Amendment—is basic to free society. It is, therefore, implicit in 'the concept of ordered liberty' and as such enforceable against the States through

> the Due Process Clause * * * Accordingly, we have no hesitation in saying that where a State *affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.* id at 27-28 There was disagreement as to the legal consequences of this view but none as to its validity.' We adhere to it." (Italics ours)

In the case at bar, the Respondents' position is that under the laws of the State of New York they are permitted to tap telephones, pursuant to an order of the Court. The State Constitutional provision, and the Code of Criminal Procedure, hereinabove cited, upon which they base their authority to tap telephones, is diametrically opposed to the provisions of Section 605. Therefore, if the logic of the Court, hereinabove stated follows, then the *Stefanelli* case differs from the case at bar and might give rise to constitutional considerations.

In *Benanti* v. *U. S.*, *supra*, the Court, at page 102, stated as follows:

> "Furthermore, confronted as we are by this clear statute, and resting our decision on its provisions, it is neither necessary nor appropriate to discuss by analogy distinctions suggested to be applicable to the Fourth Amendment. Section 605 contains an express, absolute prohibition against the divulgence of wiretapping. Nardone vs. United States, 302 U. S. 379, 382."

A perusal of the above leads to the foliowing distinction between *Stefanelli* and the case at bar. In *Stefanelli* (1) the state police in making an illegal search and seizure were not violating any federal law; (2) that the search and sei-

zure was an accomplished fact; and (3) the Constitutional Provisions and the Code of Criminal Procedure of the State of New York, permitting wiretapping, is in direct conflict with Section 605.

3.

The brief submitted by the Respondents seeks to becloud the issues by discussing the proceedings of a trial in the County Court of Bronx County knowing full well that under the rules of this Court the record of that proceeding forms no part of the record in this case. Further, the facts as alleged in Respondents' brief as to that trial in the County Court of Bronx County are, to be most charitable, not accurately set forth, and for this Court to consider the issues in that proceeding, a voluminous record of the pretrial and trial proceedings, would have to be incorporated in the record. As this trial took place subsequent to the federal proceedings herein in issue, it is apparent that the Respondents are wilfully violating the rules of this Court. To present issues *dehors* the record to this case is incompatible with proper judicial review of the issues to be determined by this Court, and as such, should be stricken from the brief filed by the Respondents.

The District Attorneys' Association of the State of New York, with their brief as *amicus curiae* also submitted an appendix of certain testimony given at a hearing before the subcommittee on the Constitutional Rights of the Committee on the Judiciary, United States Senate, and before the Commission of Investigation of the State of New York. It is respectfully submitted that this one-sided testimony, while proper in the respective committee, has no place in

the judicial review of the issues presented to this Court and should be stricken from the record.

In the interest of justice, however, Petitioner disputes the facts as set forth by the Respondents relating to the proceedings of the trial in the County Court. The United States Court of Appeals had issued an order on February 11, 1960, restraining the "using and disclosing wiretap evidence at the trial of Pugach in the County Court of Bronx County, New York, on the *two* indictments there pending against him" (R. 24).

Thereafter the order was unanimously clarified by the United States Court of Appeals sitting *en banc*. The opinion of Friendly, *J.*, appears in 280 F. 2d 521. It might be noted that Respondents' brief for some unexplained reason uses the word "enlarged" rather than "clarified"? The reason seems obviously that the clarification referred to the word "using" and did not enlarge the original order of February 11, 1960, as the Respondents would have this Court believe.

Despite the mandate of the United States Court of Appeals, the District Attorney on February 24, 1960, moved the indictment for the gun case for trial although the violation of the law occurred almost four months after the maiming charge is alleged to have taken place. Defense counsel was forced into trial unprepared. He moved the Court for a preliminary hearing to determine the leads obtained by the police as a result of the wiretapping of Petitioner's telephone. This brought in issue the mandate of the United States Court of Appeals enjoining the use made by the police of the overheard conversation. This motion was denied on three separate occasions.

During the trial itself it was established that a wiretap on the telephone of the Petitioner had been in existence, pursuant to an order of the Supreme Court of the State of New York, for a period of approximately four and a half months. This disclosure to the jury also violated Section 605 (see footnote 6, *Benanti* v. *U. S.*).

The Respondents' brief naively attempts to characterize this application for a preliminary hearing as a discovery proceeding to ascertain the evidence in the hands of the prosecution (Respondents' brief, page 16). Defense counsel offered to prove that on the day before Petitioner's arrest there had been a conversation on the tapped telephone that Petitioner was carrying a gun in his brief case and might hurt himself. To this offer of proof Respondents objected and the Court sustained the objection and would not allow this testimony in evidence.

Strangely enough the morning following that conversation the Petitioner was arrested while carrying his brief case in the lobby of his office building. Respondents are far from candid in their further recitation of the facts by suggesting that the County Court Judge, having no knowledge as to the proceedings in the federal courts, had been intimidated in postponing the sentence until November 9, 1960, a date to which the Petitioner himself finally requested that sentence be passed. Respondent fails to allege how or by what means the Judge was intimidated. The Respondent does not mention, however, that the Petitioner had been sent to Bellevue Hospital for mental observation. That the psychiatrist filed a report that the Petitioner was suffering from schizophrenia, paranoid type, and was found to be incapable of understanding the charges or making a de-

fense. That many hearings were held until that issue was determined.

Further the County Court had full knowledge of all federal proceedings at the time the gun indictment was moved for trial being advised by both the Respondents and Petitioner's attorney. The clarification order was brought to the attention of the Court on a motion to set aside the verdict of a jury based on the violation of the order of the United States Court of Appeals and on the violation of Section 605 when the jury, during the trial of the gun case, became cognizant of the existence of the wiretap on the Petitioner's telephone. *Benanti* v. *U. S.*, footnote 6. The Court agreed to adjourn sentence until the disposition of the maiming indictment.

Petitioner's counsel requested several adjournments of the sentence, but the Respondents objected and the Court finally set November 14, 1960, for sentence peremptorily against the Petitioner with the added admonition that it would not tolerate any further adjournment. In the light of this situation, as Petitioner had to be in Court on November 9, 1960, Petitioner's counsel suggested that the sentence be advanced to the 9th day of November rather than come back on the 14th day of November.

With respect to Respondents' contention that there was no proof that Respondents tapped Petitioner's telephone and divulged the information thus obtained to the Grand Jury and that the Respondents intended to use such evidence on the trial of the two indictments is without foundation in fact. The complaint alleged all these facts and as the sufficiency of the complaint was attacked by the Respondents' cross-motion the allegations in Petitioner's

complaint must be assumed to be true. The Court further heard oral arguments of counsel in open Court and the factual determination of the District Court and the United States Court of Appeals are binding on this Court. The Attorney General of the State of New York concedes these facts to be true on page 6 of his brief.

The District Attorneys' Association in their appendix sought to show the problems confronting the prosecutor of the State of New York. However, the evil sought to be avoided when Congress enacted Section 605 was the destruction of the right of privacy. Wiretapping is conducive to extortion, blackmail and intrusion almost into the recesses of the mind of the citizenry. It would lead to a police state. The danger is manifest in the case at bar where for a period upwards of four months every confidential communication over the telephone of a lawyer, his partner and associate has been overheard. Assuming *arguendo*, that a client called his lawyer on the telephone, relying on the confidential relationship of attorney and client, and divulges his participation in a crime or other immoral acts, the police tapping the telephone could use that information for police purposes or extortion. This carried further could apply to religious, political or social conduct of the sender of the communication which might expose him to blackmail or public ridicule.

Nearly a generation ago, Mr. Justice Brandeis predicted (dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 471, 473) that—

> "Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for

the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

4.

The District Attorneys' Association of the State of New York in their brief as *amicus curiae* seeks to upset *Benanti* v. *United States, supra,* on the ground that the Court overlooked a prior decision of this Court in *Stemmer* v. *People of the State of New York,* 336 U. S. 963. This was a *per curiam* decision by a divided Court. The issues were not the same as *Benanti* and the failure of this Court to cite it, in the unanimous opinion of this Court in *Benanti,* does not of itself indicate that *Stemmer* was not taken into consideration. The contrary is more plausible.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the United States District Court and the judgment of the United States Court of Appeals should be reversed.

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SUPREME COURT OF THE UNITED STATES

No. 111.—October Term, 1960.

Burton N. Pugach, Petitioner, v. Hon. Isidore Dollinger, District Attorney of Bronx County, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February 27, 1961.]

Per Curiam.

The judgment is affirmed on the authority of *Schwartz* v. *Texas*, 344 U. S. 199, and *Stefanelli* v. *Minard*, 342 U. S. 117.

Mr. Justice Brennan would also affirm but solely on the authority of *Stefanelli* v. *Minard*, 342 U. S. 117.

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[February 27, 1961.]

Mr. Justice Douglas, with whom The Chief Justice concurs, dissenting.

In *Schwartz* v. *Texas*, 344 U. S. 199, a pawnbroker was convicted as an accomplice in a robbery. Records of his telephone conversations, gotten by police eavesdropping, were admitted in evidence against him during his trial in the state court. He claimed that evidence was inadmissible under 47 U. S. C. § 605.[1] This Court rejected that claim without even stopping to see if indeed there had been a violation of the federal statute. The rationale of that rejection was that, "Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute." *Id.*, 202.

The later decision of this Court in *Benanti* v. *United States*, 355 U. S. 96, swept away that rationale, and

[1] ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ." See *Nardone* v. *United States*, 302 U. S. 379; *Nardone* v. *United States*, 308 U. S. 338; *Weiss* v. *United States*, 308 U. S. 321; *Benanti* v. *United States*, *supra*; cf. *Goldstein* v. *United States*, 316 U. S. 114; *Rathbun* v. *United States*, 355 U. S. 107.

Schwartz v. *Texas*, *supra*, today stands alone as an aberration from the otherwise vigorous enforcement this Court has given to the congressional policy embodied in 47 U. S. C. § 605. For in *Benanti*, in setting aside a federal conviction, we held that the proscription of wiretapping contained in § 605 forbade wiretapping by an authorized executive officer of the State, acting under the explicit terms of a state statute and pursuant to a warrant issued by the state judiciary. "[K]eeping in mind [the] comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy." *Id.*, 105–106. It seems incongruous to me that this sweeping congressional purpose should now be held to make a detour around the precincts of a state court. This is especially true where, as here, officials have shown such an avid taste for violating the law. See Dash, Knowlton and Schwartz, The Eavesdroppers, pp. 68–69. In such circumstances, redress—other than by an exclusionary rule—against the criminal acts of those who bear the badge of the law is neither easy nor generous. Cf. *Wolf* v. *Colorado*, 338 U. S. 25, 41, 42–44 (dissenting opinion).

Yet today a majority of this Court summarily holds that *Schwartz* v. *Texas*, *supra*, is still the law, and petitioner is left only with the consoling knowledge that Congress *meant* to protect the privacy of his telephone conversations,[2] while the benefits of the congressional intendment are denied him.

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[2] *Schwartz* v. *Texas*, *supra*, stands for no more than a refusal, as a matter of federal law, to void a conviction said to be based on wiretap evidence. The witness who divulges wire-tap information, is no less guilty of a federal crime. See *Schwartz* v. *Texas*, *supra*, 201. Nor, after *Benanti*, does the fact that New York purported to author-

Petitioner is charged, in a New York state court, with the commission of several serious crimes. His complaint in the instant proceeding alleged that "on or about June 15, 1959, and thereafter" agents of the District Attorney and of the New York police force tapped his telephone wires pursuant to a state court warrant and "obtained certain information." That information, and other evidence to which it led, was divulged to the grand jury, which indicted petitioner, and to the press. But more importantly there was the allegation that the "defendants intend to use the evidence obtained through the illegal use of the aforesaid illegal wire taps upon the trial" which petitioner imminently faces. The prayer asked that the defendants be enjoined "from proceeding . . . upon the indictments . . . on any grounds in which they may use wire tapping evidence, or on any grounds or investigations resulting from or instituted as a result of the aforesaid illegal wire taps."

There is no doubt that, once the wire-tap evidence is put in during the impending trial, petitioner is without remedy for the prejudice it does him in that trial, either in the state courts, *People* v. *Variano*, 5 N. Y. 2d 391, 185 N. Y. S. 2d 1, or, under *Schwartz* v. *Texas*, *supra*, in the federal courts.

In *Stefanelli* v. *Minard*, 342 U. S. 117, the petitioner was charged with a violation of the state gambling laws. He sought to enjoin the use, at his trial, of evi-

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ize this police wire tap save it from illegality. See *In re Telephone Communications*, 9 Misc. 2d 121, 170 N. Y. S. 2d 84; *Matter of Interception of Telephone Communications*, 23 Misc. 2d 543, 198 N. Y. S. 2d 573. As I indicated in my dissent in *Schwartz* v. *Texas*, *supra*, 205, I am of the opinion that a wire tap is a search within the meaning of the Fourth Amendment, so that, in the absence of illegality under § 605, I would have to consider if the New York wire-tap procedure meets the constitutional test of reasonableness. But under § 605, *all* wire taps are forbidden.

dence obtained by a police invasion of his home, an invasion admittedly in violation of the command of the Fourth Amendment. Relief was denied in the exercise of equitable discretion, three factors being relied on. First, the petitioner, it was said, could show no irreparable injury, for, at worst, he would go to jail on the evidence sought to be suppressed. Second, it was supposed that the federal court was being asked "to intervene piecemeal to try collateral issues." Third, and overriding the first two, was the traditional reluctance of a federal court to meddle in state court proceedings, and especially in state court criminal proceedings.

The strongest expression of that reluctance is found in the general prohibition of federal injunctions "to stay proceedings in a State court." 28 U. S. C. § 2283. Although that provision bars an injunction operating on a party, after commencement of the state court proceedings, as well as an injunction directly against the state court, *Harkrader* v. *Wadley*, 172 U. S. 148; *Ex parte Young*, 209 U. S. 123, 161–162, it is not directly involved here. *Here the thrust of the relief is only to enjoin the use of wire-tap evidence, not to enjoin the action itself. Hence there is no bar to maintaining the action.* Cf. *Rea* v. *United States*, 350 U. S. 214. Where, as here, the relief sought is the adjudication of collateral matters which cannot be adjudicated in the state proceedings under state law, there is no occasion to invoke the statute. "That provision is an historical mechanism (Act of March 2, 1793, 1 Stat. 334, 335) for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts *having potential jurisdiction over the same subject-matter*." *Hale* v. *Bimco Trading Co.*, 306 U. S. 375, 378. (Emphasis added.) Hence I do not reach the questions that would

be raised if we had before us the alternative of enjoining the state action or withholding all relief.

Can the dangers of allowing this early resort to the federal court outweigh the wrong of subjecting petitioner to the risk of conviction and imprisonment on the strength of criminally obtained and criminally presented evidence? This is not a case where there is piecemeal resort from one court to another. This remedy is the only one which is available to protect a federal right.[4] It is not a case where an appeal is properly delayed, so that the asserted error may be seen in the context of the whole trial, as no review at all is available. For the same reason, this is no case

[3] 28 U. S. C. § 2283 provides for three classes of exception: (1) as expressly authorized by Act of Congress, (2) where necessary in aid of jurisdiction, and (3) to protect or effectuate its judgments. Cf. *Toucey* v. *New York Life Ins. Co.*, 314 U. S. 118. Injunction against the *commencement* of state court criminal proceedings has long been the first line of defense for federally secured rights. As respects federally secured civil rights see, *e. g.*, *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Terrace* v. *Thompson*, 263 U. S. 197; *Hague* v. *C. I. O.*, 307 U. S. 496; cf. *Douglas* v. *Jeannette*, 319 U. S. 157. As respects federally secured economic rights see, *e. g.*, *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86; *Cline* v. *Frink Dairy Co.*, 274 U. S. 434; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497.

[4] Judge Clark, dissenting in this case below, said: "In sum it is beyond dispute that there is a general, indeed universal, custom of federal law violation. Now this is a distressing situation, made not less so that in the eyes of many worthy citizens it is required by the asserted exigencies of successful law administration. But it is not an unusual situation. For actually it is a clash between federal and state governmental policies. As such it is a recurring struggle in our history and quite possibly a necessary one to a federal form of government. In the past we have found ways of meeting and solving the problem. Of course there are several forms of remedy; but the one to which there seems continual return when other remedies fail is the resort to the equity powers of the federal courts to enjoin repeated violations of the criminal law." 277 F. 2d, at 748–749.

for the exercise of equitable discretion. If the federal question is not now protected, it can never become the basis for relief.

The doctrine of equitable discretion properly involves no more than a choice among remedies, an orderly management of judicial procedures. Doubtless there are times when equity should leave parties to their remedy "at law," *i. e.*, to their remedy in the ordinary course of the threatened proceeding. But once it is established that the other proceeding offers no remedy, the rationale of equitable discretion disappears. It becomes no more than the legal language which clothes the denial of a right in the guise of a mere procedural decision. Unless and until *Schwartz* v. *Texas*, *supra*, is overruled, the exercise of equitable discretion to deny preliminary relief from the threatened use of wire-tap evidence is wholly unjustified. Unless and until *Schwartz* is overruled, the beneficent effect of § 605 will be stultified by the admission of tainted evidence in state trials. The privacy of the individual, history assures us, can never be protected where its violation by state officers meets with reward rather than punishment.